COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1170

COMMONWEALTH

vs.

TOMMY SOSTRE.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant was convicted on one count of counterfeiting a motor vehicle inspection sticker and one count of uttering a counterfeit motor vehicle inspection sticker. He appealed and also moved for a new trial, asserting that his counsel was ineffective in failing to move to suppress evidence and failing to call the defendant's father as a witness. The judge denied his motion. The defendant's appeals from that ruling and from his underlying convictions were consolidated and are now before us. On appeal, he argues that the judge erred in declining to provide the jury with special verdict slips and in denying his new trial motion. We affirm.

Background. The defendant's father operated a garage, Tony's Auto, where the counterfeiting took place. The defendant himself obtained a Registry of Motor Vehicles (registry) license

to perform vehicle safety and emissions inspections. After a typical inspection, a registry-linked computer system prints the results on registry-provided sticker stock, and the sticker is placed on the vehicle's windshield. In late 2012 and early 2013, the registry received reports from police of vehicles bearing fraudulent inspection stickers, which were traced to Tony's Auto. Police obtained a warrant and searched the garage, finding evidence that stickers were being counterfeited. A grand jury returned two indictments charging the defendant with twenty counts each of counterfeiting and of uttering, involving twenty specified inspection stickers. Count twenty of each charge was nol prossed, leaving nineteen counts of each charge for trial.[1]

Discussion. 1. Special verdict slips. In his direct appeal, the defendant asserts that the judge erred by denying his request to provide special verdict slips. He maintains that without them, there is no way to be sure that the jury unanimously agreed upon any particular incident -- i.e., upon the counterfeiting and uttering of any particular sticker -- and that, because the evidence as to certain stickers was insufficient, the verdicts cannot stand. We are not persuaded.

[1] The defendant was also indicted on two charges of conspiracy; after he was convicted of the substantive offenses, the conspiracy charges were dismissed.

First, there is no reason to doubt that the jury reached specific unanimity, because the judge instructed them that they must do so to convict, and we presume that they followed that instruction. See Commonwealth v. Jackson, 384 Mass. 572, 579 (1981). Upon a defendant's request, see Commonwealth v. Conefrey, 420 Mass. 508, 514 (1995), a specific unanimity instruction is required "when, on a single charged offense, the Commonwealth presents evidence of separate, discrete incidents, any one of which would suffice by itself to make out the crime charged." Commonwealth v. Arias, 78 Mass. App. Ct. 429, 432 (2010). Here, the judge told the jury several times that, to find the defendant guilty, they were required unanimously to find that the defendant committed the offense on at least one of the specific occasions alleged in the indictments. The judge then stated this instruction more clearly, telling the jury "in other words, six of you can't vote for one count and six for another count." The defendant identifies no error in this instruction.

Second, although the defendant requested special verdict slips that would have required the jury to identify which (if any) of the nineteen specific incidents or counts they agreed upon, the defendant was unable to cite any case law requiring such slips in these circumstances, or to offer any argument as to why they should be required. The judge denied the request.

On appeal, the defendant again fails to cite any such authority, and he fails to persuade us that the law should be extended to create such a requirement. Cf. Commonwealth v. Santos, 440 Mass. 281, 286-290 (2003), overruled on other grounds, Commonwealth v. Anderson, 461 Mass. 616, 633, cert. denied, 568 U.S. 946 (2012) (discussing limited circumstances in which specific unanimity instruction and special verdict form are required in cases tried on "more than one theory").

Third, the evidence here was sufficient as to each of the nineteen separate incidents. See Commonwealth v. Plunkett, 422 Mass. 634, 639 (1996) ("there must be evidence to support each alternative theory submitted to the jury to uphold a general verdict of guilty"); Arias, 78 Mass. App. Ct. at 432. The Commonwealth proceeded on the theory that the defendant was a joint venturer with his father. This required the Commonwealth to prove "that the defendant knowingly participated in the commission of the crime charged, with the intent required to commit the crime." Commonwealth v. Zanetti, 454 Mass. 449, 467 (2009). As we discuss infra, the Commonwealth offered sufficient evidence of the defendant's having done so with respect to each of the nineteen inspection stickers listed in the indictments. See Commonwealth v. Latimore, 378 Mass. 671, 677 (1979).

As to the element of knowing participation, there was evidence that the garage was licensed to inspect vehicles under the defendant's name.[2] None of the nineteen incidents of counterfeiting and of uttering, which all occurred during a single thirty-day period in September and October of 2013, would have been possible without the defendant's involvement. It was his license that allowed the garage to obtain an inspection computer and other equipment, software, and sticker stock from a registry-approved contractor.

As to the element of intent, there was evidence that, during the thirty-day period, the defendant had logged in to the computer system to produce eleven of the nineteen counterfeit stickers at issue.[3] Also, an automobile mechanic who brought vehicles to Tony's Auto for inspections testified that the defendant would sometimes provide him with "fake" stickers for vehicles that could not pass inspection.[4] The mechanic further

---

[2] There was no evidence that someone else had used the defendant's name to obtain the license.

[3] The remaining eight involved log-ins by the defendant's father or by a third person who had the same surname as the defendant and his father. There was evidence that the defendant had several siblings.

[4] The mechanic testified that the defendant was like a son to him and that he did not want to get the defendant in trouble; the jury could have found that the mechanic was intentionally minimizing the defendant's involvement. Based in part on the mechanic's testimony that "he love[d] the defendant like a son," the judge allowed the Commonwealth to treat him as a hostile

testified that the fake stickers were made in a separate area of the garage. There was video recorded evidence showing the defendant inspecting a vehicle, walking into a different part of the garage, and returning with something the size of a sticker. That vehicle, a Ford Windstar, was later found with a counterfeit sticker made using the defendant's computer log-in. From all of this evidence, a rational trier of fact could have found beyond a reasonable doubt that the defendant knowingly participated, with the requisite intent, in counterfeiting and uttering each of the nineteen stickers.

2. Motion for new trial. The defendant's motion for a new trial argued that counsel was ineffective in (1) failing to move to suppress evidence seized during the search of the garage and (2) failing to call the defendant's father as a witness to provide exculpatory evidence. We review the judge's order denying the motion for "a significant error of law or other abuse of discretion," and we "extend[] special deference to the action of a motion judge who was also the trial judge," as in this case. Commonwealth v. Grace, 397 Mass. 303, 307 (1986). The judge did not abuse her discretion here.

---

witness. The mechanic's grand jury testimony, which was read at trial, said that the defendant "never refused to do fake inspection stickers."

a. Failure to move to suppress. The defendant asserts that counsel should have moved to suppress the evidence seized from Tony's Auto on the grounds that the search warrant was based on stale information and there was no probable cause to seize and search the video surveillance equipment. We are not persuaded by either argument. "[T]he defendant has [not] demonstrate[d] a likelihood that the motion to suppress would have been successful," and thus counsel's failure to file such a motion was not ineffective assistance. Commonwealth v. Comita, 441 Mass. 86, 91 (2004).

The issue of staleness -- i.e., whether information in a search warrant affidavit is sufficiently fresh to show probable cause that the items to be searched for are still in the place to be searched -- is "determined by the circumstances of each case." Commonwealth v. Atchue, 393 Mass. 343, 349 (1984), quoting Sgro v. United States, 287 U.S. 206, 211 (1932). The recency of information is less significant when the items to be searched for are "not likely to be consumed or destroyed," and the illegal activity is protracted and continuous. Commonwealth v. Fleurant, 2 Mass. App. Ct. 250, 255 (1974). See Commonwealth v. Blye, 5 Mass. App. Ct. 817, 817-818 (1977) (four-month interval between defendant's receipt of stolen chain saws and warrant application did not render application stale, because nature of stolen items made them likely to remain with recipient

for longer period than consumables, and there was evidence of defendant's ongoing receipt of other stolen property). See also Commonwealth v. Pratt, 407 Mass. 647, 662 n.14 (1990).

Here, the warrant affidavit contained evidence of protracted and continuous criminal conduct at Tony's Auto, in the form of twelve separate incidents of suspicious inspection sticker activity in June, July, October, November, and December of 2012 and in March, June, and August of 2013. The application sought a warrant to search Tony's Auto for items such as inspection documents, computers, stickers, typewriting equipment, and software. These items were unlikely to be consumed or destroyed, as they were integral to both the defendant's suspected illegal operation and his otherwise presumably legitimate inspection business. The items were also durable and not inherently incriminating to possess, so the passage of time would not diminish probable cause that they would still be found at the garage. See Blye, 5 Mass. App. Ct. at 818. The most recent suspicious activity occurred on August 13, 2013, and police detected it on September 13, 2013; police applied for and obtained the warrant on October 7, 2013. We conclude that the information in the affidavit was not stale.

Second, the defendant argues that there was not probable cause to seize and search the garage's video surveillance equipment. But the affidavit was not, as the defendant claims,

"merely conclusory" on the subject of whether the video recordings stored in that equipment would contain relevant evidence. Commonwealth v. Morin, 478 Mass. 415, 428 (2017). Examining the whole affidavit, see Commonwealth v. Ramos, 402 Mass. 209, 213 (1988), it showed probable cause to believe (1) that counterfeit stickers were being made and affixed to vehicles inspected at the garage; and (2) that stored video recordings would show those vehicles, the person(s) who brought them to the garage, and the employee(s) who placed the stickers on the vehicles. The affidavit thus demonstrated ample probable cause to seize and to search the video recording equipment. Accordingly, counsel was not ineffective in failing to file a motion to suppress. See Comita, 441 Mass. at 91.

b. Failure to call defendant's father as a witness. The defendant's new trial motion also asserted that counsel was ineffective in failing to call the defendant's father as a witness who assertedly would have exonerated the defendant. "Where a claim of ineffective assistance of counsel is predicated on some error that may fall within the realm of tactical strategy, such as counsel's decision to call (or not to call) a witness," the defendant must establish that the decision was manifestly unreasonable at the time it was made (quotation omitted). Commonwealth v. Lane, 462 Mass. 591, 596 (2012). The defendant has not met that burden here.

First, the judge properly considered the absence of any affidavit from the defendant's father confirming his willingness to testify that the defendant was not involved in the counterfeiting scheme. Although the defendant and appellate counsel both filed affidavits stating that the father had said he was willing, "[h]earsay contained in affidavits may be ignored by the motion judge." Commonwealth v. Goodreau, 442 Mass. 341, 353-354 (2004).

Second, even assuming the father's continued willingness to testify, and even putting to one side that the defendant's motion was unaccompanied by an affidavit from trial counsel,[5] the trial record makes plain that counsel's decision not to call the defendant's father as a witness was tactical. Counsel had initially informed the judge, at the beginning of trial, that she did intend to call the father. This was her plan even though, as the judge later observed, the father "would have been subject to damaging impeachment if called[,] because of his

[5] According to appellate counsel's affidavit, and perhaps tellingly, trial counsel did not respond to repeated attempts to contact her to discuss the issues to be raised in the new trial motion. In denying the motion, the judge properly observed that an affidavit from trial counsel was "conspicuously absent" and that, under Goodreau, 442 Mass. at 354, this weighed against the ineffective assistance claim.

apparent partiality toward the defendant and because of his record of criminal convictions."[6]

By the close of the Commonwealth's case, however, counsel's approach had changed. She stated her view that the Commonwealth's "main witness," the mechanic, who had testified under a cooperation agreement, "didn't come through for them and certainly did not implicate [the defendant]." Counsel then told the judge that she had decided not to call the father, and she rested her case. Counsel also told the judge that, after discussing the matter with her client, she was waiving a request (which she had evidently made earlier) for a jury instruction under Commonwealth v. Ciampa, 406 Mass. 257, 266 (1989) (jury to be instructed that testimony of witness pursuant to cooperation agreement should be evaluated with particular care).

This succession of events indicates that counsel viewed the testimony of the Commonwealth's "main witness" as doing little damage to her client and as leaving doubt regarding his guilt. She could well have calculated at that point that calling the defendant's father, an easily-impeached witness, to testify for the defense would have done more harm than good. "Trial tactics which, from the vantage point of hindsight, can be seen to have failed do not amount to ineffective assistance unless manifestly

[6] At sentencing, defense counsel described the father's criminal record as "very lengthy."

unreasonable when undertaken" (quotation omitted). Commonwealth v. Sielicki, 391 Mass. 377, 379 (1984). The defendant has not shown that counsel's approach here met that standard, and thus we see no abuse of discretion in the denial of the defendant's motion for a new trial.

Judgments affirmed.

Order denying motion for new trial affirmed.

By the Court (Milkey, Hanlon & Sacks, JJ.[7]),

Joseph F. Stanton

Clerk

Entered: June 27, 2019.

[7] The panelists are listed in order of seniority.